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ABSTRACT

A 1973 Supreme Court decision ("Miller v. California") established the system of defining obscenity on the local level according to the following criteria: first, prurient appeal and patent offensiveness are to be determined by a community rather than by a national standard; second, sexually explicit materials are judged obscene only if specified as such by state or federal law; and, finally, sexually explicit communications are protected only when they are judged to be of serious literary, artistic, political, or scientific value. During the past five years, each criterion has created problems and aroused controversies involving the definition of a relevant community, the subjective attitudes of jurors, the development of state guidelines on obscenity, and valid judgments regarding the quality of questioned material. In addition to the confusion it has produced, the shift to local standards in obscenity prosecution has required repeated appeals to higher courts and has thereby established a process similar to the original national standard that governed judgments on obscenity. (MAI)

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OBSCENITY LAW SINCE MILLER: ANOTHER TROUBLESOME BALANCING FORMULA

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I

Introduction

There is mounting evidence that the U.S. Supreme Court's 1973 landmark decision in Miller vs. California, which sought, according to Chief Justice Burger, "to formulate standards more concrete than those in the past,"[1] may be more unsettling in its constitutional guidelines than any previous judicial determination. The ramifications of the three-pronged obscenity test laid down in Miller have been noted in nearly 150 obscenity cases in the past four years, as well as in the legislatures of thirty states. The Supreme Court has ruled in related cases several times since the original six decisions which comprise Miller were handed down. In all instances the same five-justice majority has clung doggedly to its initial guidelines while adding only additional clarification.

That clarification has been consistently required is reflected in several remarks from the Bench in the past few years. Justice Stevens in his dissent in the "Smith" case, the most recent Supreme Court pronouncement on obscenity noted, "although the Court's affirmance of this conviction represents a logical extension of recent developments in this area of the law, it sharply points out the

need for a principled re-examination of the premises on which it rests."[2] Justice Tobriner of the California Supreme Court dissented in Bloom vs. Municipal Court of Inglewood (a case challenging the vagueness of California statutes) because, "all are entitled to be informed as to what the state commands or forbids . . . no one . . . should have to speculate as to the meaning of penal statutes."[3] In fact the Supreme Court of Massachusetts observed in 1976 that the nature of Miller is such that the guidelines are viewed as transient.[4]

The ultimate problem is one that is ever present when the courts seek to balance First Amendment freedoms against implicit societal values: deriving a meaningful set of guidelines for what constitutes protected speech, and then interpreting those guidelines in all cases that arise. "Miller" itself recognized that "the absence since 'Roth' of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts."[5] Unfortunately, the long-awaited majority view voiced in Miller has only exacerbated the burden of the courts. Justice Stevens expressed the views of many frustrated jurists when he noted, ". . . criminal prosecutions are an unacceptable method of abating a public nuisance which is entitled to at least a modicum of First Amendment protection."[6]

This paper is a review of the post-Miller attempts at obscenity regulation. While it is the author's view that guidelines are unworkable in general, it will be shown that the Miller guidelines are particularly undesirable. The paper concludes with the suggestion that the creation of a category outside of First Amendment protection, known as obscenity, does more harm to the serious, if racy, work than it does to the "lewd" and "lascivious."

II

What Miller Actually Says

In essence when the courts refer to Miller, they are actually describing six obscenity cases all decided on June 21, 1973. Although Miller vs. California, the flagship case, had the greatest amount of substance and impact, the other cases served to broaden the scope of the former. It should be noted that none of these cases resolve the question of what obscenity is. In fact the Miller rules are best understood as the basis of a system of obscenity definition in which the question of what is obscene need never be definitively answered.

In the most important case, Miller vs. California, the Court laid down three tests for the determination of an obscene work. All of the tests must apply before an item can be considered obscene. First, Miller established that traditional signs of the obscenity of sexually explicit communications, prurient appeal and patent offensiveness, need not be identified by reference to a uniform national standard.[7] The court held, second, that sexually explicit communications may be found obscene only if state or federal law specifies the conduct depicted or described to be potentially obscene.[8] Finally, Miller redefined the

scope of the First Amendment privilege protecting sexually explicit communications such that material not "utterly without redeeming social value," and therefore previously privileged, henceforth may be suppressed unless it is found to be of serious literary, artistic, political or scientific value, or unless a trier of fact finds it not to be offensively prurient.[9]

The other "Miller" cases have had limited application but a brief description of them is meaningful.

Paris Adult Theater I vs. Slaton[10] brought forth the principle that expert testimony is not necessary in obscenity prosecutions. Additionally it sought to establish the premise that the government does have the right to prohibit obscenity for adults.

U.S. vs. Orito[11] and U.S. vs. 12 200-ft. reels[12] extended the Miller standards to Federal statutes.

Kaplan vs. California[13] offered the proposition that obscene material in book form is not protected merely because it has no pictorial content.

Finally, in Heller vs. New York[14] the court held that it is not necessary to have a prior adversary hearing before a motion picture may be seized as obscene pursuant to a warrant issued after a judge has viewed the film.

Clearly the three important concepts arising from the Miller decisions are: the idea of a community standard

of prurient interest and patent offensiveness determined by the triers of fact; the specificity required of legislatures in defining patent offensiveness; and the "L.A.P.S." test for defining serious value. The next three sections will analyze each of these tests individually in terms of the problems which they have had in application.

III

The Community Standard

The Court indicated in Miller that the basic guidelines for the trier of fact must be: (a) whether "the average person applying contemporary community standards" would find that the work taken as a whole appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[15] Although the Miller rules, as stated, appear to provide that only prurient appeal should be judged by reference to community standards the majority opinion in Miller vs. California implies that patent offensiveness is also to be evaluated on the basis of community standards.[16] Several court cases and commentators have regarded both prurient appeal and patent offensiveness as judged in terms of community standards.[17]

The idea of a community standard was not new at the time of Miller. Chief Justice Warren had planted the seed ten years earlier when he concluded in the Jacobellis decision that a national standard for judging obscenity was not provable and he suggested the substitution of community

standards as an acceptable alternative.[18] Even in the controversial "Memoirs" decision Justice Brennan stated as a second test: "(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters."[19]

Despite the "lip-service" given community standards the court was clearly applying a national standard. Beginning in 1967 with Redrup v. New York,[20] the Court adopted the practice of using per curiam opinions to announce without explanation the decision reached in obscenity cases. As Redrup effectively nationalized the process of obscenity determination, similarly the concept of national community standards put forward in pre-Redrup cases nationalized the substance. It was this concept of a national standard that the Miller Court was most interested in remedying. Such national standards, the Miller Court argued, were "hypothetical and unascertainable" and hence their application was necessarily "an exercise in futility."[21]

The heart of the problem was that in the absence of an agreed-upon standard, the Court could not share the work of judging obscenity with lower federal courts, state courts, law enforcement agencies and potential communicators themselves. Courts attempting to take account of Redrup era Supreme Court decisions could do so only through the uncertain process of directly comparing the material they

were required to judge with the material that the Court had ruled not obscene.[22]

The Miller rules effectively restructure the process through which official answers are generated to the questions of what obscenity is and whether it ought to be suppressed. Appellate courts and legislatures no longer play paramount roles. Instead much of the locus of responsibility shifts to triers of fact. The trier of fact discretion that Miller permits, in effect, reverses Redrup's institutional distortion. Direct appellate review of findings of prurient appeal and patent offensiveness becomes impossible. If the trier of fact is free to identify and apply community standards unrestrained by judicial or legislative specification of the relevant community, and without regard to evidence introduced at the trial, the trier of fact's conclusions are shielded from most appellate scrutiny. In fact, several commentators have agreed that the Supreme Court, unfamiliar with the standards of particular communities and unable to rely on a trial's evidentiary record for the factual basis of trier of fact determinations, will not independently review questions of prurient appeal and patent offensiveness.[23]

The two key questions, then, four years after Miller are: How has the relevant community been defined? and What are the ramifications of "trier of fact" judgments?

Which Relevant Community?

As recently as September 1977 Judge Moore of the U.S. Court of Appeals 2nd Circuit observed: "The scores of cases cited to us and the District Court's statement that 'there has been no concensus among the lower federal courts as to which community's standards Miller meant to tap' embolden us though with some trepidation, to suggest that much of the difficulty arises from the use of the expression 'community standards.'"[24]

The difficulty referred to is the problems the court has faced in determining which community triers of fact should have in mind when evaluating the prurient appeal and patent offensiveness of various works. In Miller the Court, while criticizing at length the national standard requirement, gave slight attention to the implications of its repudiation of that standard, noting only that it was not constitutional error for a jury to be instructed that the prurient appeal and patent offensiveness of an allegedly obscene work should be determined by reference to statewide standards.[25] However obscenity decisions simultaneous with or subsequent to Miller v. California suggest that the Supreme Court has not only rejected the concept of a national standard, but has also permitted triers of fact broad discretion in defining the relevant community and in applying that community's measure of obscenity.

This does not preclude the use of a national standard where the jury or judge sees fit to use one. This point was brought out rather ironically in Hamling v. U.S.[26] In that instance the defendants, appealing a pre-Miller conviction, in the days just after Miller, sought to introduce a survey of the obscenity standards in the San Diego area where their materials were distributed. Presumably the survey would have shown their works to be acceptable, if one defined the community in the same manner as they. However their original conviction was based on a national standard and the Court upheld the conviction on that basis stating: "A) Nothing in Miller precludes the use of a national standard if a community desires. B) Expert testimony indicates that these materials were similar to those around the rest of the country."[27] This is the only case of note where a national standard has been applied since Miller and one suspects that the Court was straining somewhat to make this decision consistent in the rather confusing period following Miller.

State courts exercising the discretion granted by Miller have differed in their choice of the relevant community. In some jurisdictions contemporary community standards have been defined in terms of the state as a whole (Georgia,[28] Maryland,[29] Washington,[30] Alabama,[31] Wisconsin[32] and New York[33]). There is something to be said for statewide standards in terms of uniformity

(see 31 and 32) and the need to protect the effectiveness of appellate review (see 33).

A few courts have selected the county as the jurisdiction in terms of which community standards are to be framed (Alabama,[34] Florida[35]). Arguably though, the county, like the municipality an arbitrary jurisdictional unit, is not likely to incorporate a single jurisdictional standard if the state as a whole does not.

The most common approach has been to leave identification of the relevant community and its standards to the trier of fact (Maryland,[36] Missouri[37]). In Jenkins v. Georgia,[38] the court suggested not only that community standards need not be statewide, but also that no particular community need be specified before or during an obscenity trial. Jenkins' reasoning was applied in Hamling when the court defined the relevant community for a federal obscenity prosecution as the community from which the jurors were selected and made clear that the Miller formulation of the community standards requirement leaves jurors free to apply their own conceptions of community mores.[39]

In a more specialized case, dealing with the importation of articles considered obscene, the U.S. Court of Appeals, 2nd Circuit determined that the Government "must demonstrate that material is obscene within local community standards of the district in which the material was seized, rather than demonstrating that material is obscene within

community standards of the district in which addressee of the material resides."[40] This precedent and the preceding one established in Hamling are important, and shall be detailed further below, in that the community standard opens wide new vistas for the federal prosecutor in the area of obscenity.

To the extent that the Supreme Court has been so vehement in its criticism of National standards one might reflect upon the alternatives which have operated for the past several years to determine if we are any better off. Several have criticized statewide standards as no less hypothetical than the national standards which Miller rejected.[41] Indeed, in Miller itself, the jury was asked to apply the contemporary community standard of California. It is doubtful that there could be a more culturally diverse state, and yet its standard for judging obscenity was assumed to be more readily ascertainable than a national standard.

Justice Stevens in his dissent in the May 1977 "Smith" case extends this argument to metropolitan areas:

> The assumption that jurors could more easily "draw on the standards of their community" than some "hypothetical and unascertainable" national standard, can only relate to isolated communities where jurors are well enough acquainted with members of their community to know their private tastes and values. The assumption does not apply to most segments of our diverse, mobile, metropolitan society. For surely, the standard for a metropolitan area is just as "hypothetical and unascertainable" as any national standard.[42]

In some ways the community standard is even more objectionable than a national standard. It has been noted in several cases that the geographic boundaries of the relevant community are not easily defined, and sometimes appear to be subject to elastic adjustment to suit the needs of the prosecutor.[43] "Moreover," according to Justice Stevens, "although a substantial body of evidence and decisional law concerning the content of a national standard could have evolved through its consistent use, the derivation of the relevant community standard for each of our countless communities is necessarily dependent on the perceptions of the individuals who happen to comprise the jury in a given case."[44]

While problems with the determination of the relevant community have clearly not shaken the slim Supreme Court majority that favors this type of standard, it is clear that there is significant support for the idea that community standards have not eased the court's obscenity burden. In truth we cannot be fully sure of what standards are applied or how they are being applied. The court must offer direction, and as we shall see this too is a weighty burden, but juror judgment is a very private matter. This then brings us to the second dimension of the community standards guideline.

The Trier of Fact

The premise underlying the Miller Court's faith in community standards is that the same jurors who act as agents of the community in judging the reasonableness of doubt of the guilt of defendant in felony cases can be extended such that the juror can gauge the moral standards of what he defines as his community. The Miller Court guidelines indicate that they expect jurors not to react subjectively or to apply the standards of a particularly sensitive person or a totally insensitive one.[45]

There are those that challenge the premise itself as unsound. Judge Moore of the federal 2nd Circuit noted:

> In reality no judge or jury can determine "community standards" with respect to . . . (a given exhibit). The best that anyone can do is to give his or her personal reaction to it. No juror or judge armed with a copy of . . . (a given exhibit) will have the opportunity to rush up and down the streets of his community asking friends and neighbors how they feel about it.[46]

And yet the Miller Court anticipated an objective evaluation from the jurors.

Even if one feels that it is possible for a given juror to weigh the issues dispassionately, there are other court guidelines which limit the scope of his decision and have served to further complicate matters. Note initially that a judge may serve as a trier of fact as an alternative to a jury.[47] In fact in a 1975 case in Chicago the jury was so confounded by the issues as to leave the judge's

opinion as the only alternative.[48] However, this paper, in discussing the role of the trier of fact under Miller, assumes that that function will be carried out in the usual case by a jury.

Miller and the subsequent decisions have greatly restricted a defendant's options in an obscenity trial. In Paris Adult Theater v. Slaton,[49] the Supreme Court substantially freed triers of fact from the necessity of relying on evidence introduced in court as the basis for identifying obscenity standards. The Paris Court held that, if the material at issue is itself introduced into evidence, expert testimony as to obscenity is not required. Triers of fact need not, therefore, rely for their conception of community standards upon evidence introduced in court. The dictum in Kaplan v. California[50] that "the defense should be free to introduce appropriate expert testimony,"[51] appears to be superceded by the simultaneous statement that in all cases the materials themselves provide a sufficient basis for judgment.[52] All of the above suggests that the trier of fact is under no obligation to give any weight to expert testimony.

In fact, a number of courts in the post-Miller period have recognized the freedom of triers of fact to disregard evidence other than the material at issue.[53] In all of these cases the Supreme Court denied certiorari observing that failure to admit defense evidence was no

error, since no testimony was needed. In Hamling as noted above a survey of community residents with respect to the brochure in question was excluded by the trial judge and the exclusion affirmed by the Supreme Court.[54] In U.S. v. Various Articles of Obscene Merchandise, the claimant testified that the mayor of Lancaster, Pennsylvania had selected some citizens to try and formulate some sort of basis to go on of what the city should do in dealing with obscene material. The claimant was himself a member of the committee and he produced a copy of their conclusions which, among other things, recommended an end to all controls on pornography except where children were involved. The judge refused to allow the report stating: "There is no reason to believe that the views of the Mayor's committee fully reflect contemporary community standards or that the Committee was any more qualified to do so than a judge or jury."[55]

With such a limited latitude of defense, the defendent is very much reliant on the quality and perception of the jury that is selected. And yet in the "Smith" case the Court greatly restricted the nature of defense challenges during jury selection. What the defense sought to ask was this: "Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?"[56]

The District Court judge refused to allow the question and the Supreme Court affirmed stating: "The District Court did not abuse its discretion in refusing to ask the questions tendered by petitioner for voir dire about the jurors' understanding of community standards, which were no more appropriate than a request for a description of the meaning of reasonableness would have been."[57]

Justice Rehnquist has made reference to the fact that such trier of fact discretion is not unique to obscenity but has its roots in negligence law. Ordinarily, however, trier of fact autonomy is not deliberately put to use by courts to serve their own institutional ends. In fact, courts in the nineteenth century generally repudiated the notion that juries could as a matter of right, disregard judges' opinions of the law and determine that matter for themselves.[58] Further, triers of fact are not generally permitted the central role in the definition of substantive constitutional standards accorded them under Miller. It is customarily "the province and duty of the judicial department to say what the law is."[59]

There is merit in such thinking. The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different

reaction in a social context. Studies have shown that an opinion held by a large majority of a group concerning a neutral and objective subject has a significant impact in distorting the perceptions of group members who would normally take a different position.[60] Thus according to Justice Stevens: "Since obscenity is by no means a neutral subject and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors particularly those who would normally be in the minority."[61] A juror may well find certain materials appealing and yet be unwilling to say so. The assumption may be, not necessarily correctly, that his reaction is at odds with the prevailing community view, especially if the first members of the jury to speak indicate that they consider the material offensive and voice such views in very strong language.

Against this reasoning it is hard to conceive of a representative community standard being laid down rationally as the Supreme Court had intended. For instance, in the "Smith" case, the defendant entered into evidence as exhibits, materials which were freely and lawfully available at stores in Iowa. These exhibits were more salacious, lewd and open in their treatment of sex than were the materials upon which the defendants were convicted. As we have seen, the jury was not obligated to consider such

evidence, but beyond this the jury's view may quite correctly have been that these materials, although freely available, were appreciated only by a deviant minority of the community and did not conform to the community standard.[62]

The Court has not defined the term "community" in other than a geographical sense. In a case currently under consideration by the Supreme Court, United States v. Pinkus,[63] the question of demographic definitions of the community will be dealt with. Pinkus claimed that jury instructions which included references to sensitive persons and children to define the community were improper in that they result in reducing the adult population of the area to reading what is fit only for children. The United States Court of Appeals for the Ninth Circuit found no reversible error here because of the lack of authority against such an outcome. While hinting that children were a part of the overall community, it was suggested that specific references to them be left out of jury instructions until the Supreme Court clearly indicates that inclusion is proper.[64] Again, efforts to develop a more precise local standard require a national pronouncement to sufficient clarity for jury deliberation.

In essence, then, jurors in collaboration would not seem to be the best forum for the determination of what speech shall be protected by the 1st Amendment and which shall not. Perhaps the most troubling aspect of this situation is the fact that because the record never discloses

the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court. Justice Stevens observed: "In the final analysis the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law."[65]

One commentator has noted that Miller's grant of discretion to fact-finders represents a radical departure from traditional first amendment jurisprudence.[66] Several courts have suggested that case-by-case decisionmaking, like that practiced by triers of fact under Miller, threatens first amendment values given its potential for arbitrariness and uncertainty.[67] The goals of reducing the court obscenity burden seemingly frustrated, the legacy of the Miller Court is what many consider an unacceptable means of evaluating first amendment protections.

IV

Specifying What Is Patently Offensive

In repudiating a national standard, the Miller Court anticipated that triers of fact could be guided in their judgment by an applicable state standard. Guideline 2 refers to patently offensive sexual conduct specifically defined by applicable state law. This specification serves two interrelated functions. First, the requirement imposes upon lawmakers a duty to make explicit the maximum reach of obscenity statutes, thus limiting the indeterminacy of obscenity adjudications. Second the requirement that legislatures list, and thus limit, conduct considered potentially obscene restricts the kinds of communications triers of fact may judge thereby containing the discretion Miller granted fact-finders. The legislative duty to specify was intended to be enforced judicially: courts will not permit triers of fact to evaluate material that does not depict sexual conduct legally specified as potentially obscene.

The foregoing would all be meaningless if legislators sought to attack obscenity with an across-the-board sweep or a clause that was meant to cover everything that was not specifically listed. Therefore the court in Miller limited the class of depicted conduct which lawmakers

could validly specify in a "few plain examples" of what obscenity statutes may define for regulation: "(a) Patently offensive representations or depictions of ultimate sexual acts, normal or perverted, actual or simulated, (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals."[68] This list was not meant to be necessarily exhaustive, merely analogous to state guidelines.

Perhaps the greatest challenge in the early days of Miller was the determination of whether applicable guidelines conformed to the Miller formula and could be construed to fit the case at hand. Many defendants considered statutes too vague and appeals to that extent still clog the appellate courts, though but a few have been heard by the "High Court." Courts and legislatures have found a variety of courses of action in the days since Miller.

Some state courts have regarded Miller as invalidating pre-Miller obscenity laws. Louisiana,[69] Massachusetts[70] and Tennessee[71] legislatures enacted replacement statutes that virtually restated Miller guidelines. Iowa[72] elected to do without a statute for consenting adults and focused solely on children. However a new bill, effective in 1978, will make obscenity distribution to adults a misdemeanor and will employ Miller guidelines. Indiana[73] chose to fill the gap with local ordinances which are generally considered quite consistent with one another.

Other state courts dealing with essentially similar statutes have held that the requisite specificity may be achieved through judicial construction. Many of the courts engaging in statutory construction simply read into state obscenity laws Miller's examples of specific definitions. In most cases the courts gave very little verbage to their rationales. In State v. Welke,[74] the Minnesota Supreme Court by way of a reversal for illegal search and seizure served notice that they considered obscenity precisely defined by way of Miller (for Minnesota) because of existing statutes. Other states that absorbed Miller by a sort of fiat include: Alabama,[75] Arkansas,[76] New Jersey,[77] North Carolina[78] and South Carolina.[79]

Courts have found judicial reconstruction unnecessary in some states because statutory language was thought to be sufficiently specific already: Florida,[80] Nebraska,[81] Missouri[82] and Ohio.[83]

Perhaps the trickiest maneuver occurred in those courts that claimed statutory language to be sufficient because prior construction (prior to Miller that is) had seemingly confined the statutes' scope within Miller's limits. For instance in the case of United Artists v. Harris,[84] the defendant argued that the Oklahoma statutes failed to meet the Miller requirements because they failed to spell out what was patently offensive and they made no allowance for a L.A.P.S. serious value test. The court

responded that in previous Oklahoma cases the full constitutional standard was implied even though not literally spelled out, and that in tracing through previous cases everything spelled out by Miller had been dealt with under the statute. Other states employing this type of approach were California,[85] Georgia,[86] New York[87] and Virginia.[88]

In a few states judicial specification has been more elaborate. New Hampshire[89] saw fit to list six categories of potentially offensive sex or sexual conduct. Washington[90] and Wisconsin[91] added bestiality to the categories listed in Miller.

Some states enacted new statutes even though the courts had either approved the specificity of the prior law or had construed that law to meet Miller's requirement: Kentucky,[92] New York.[93] South Dakota[94] and Arizona[95] made their moves to new statutes without any prompting, but apparently in advance of expected court actions.

According to a recent review New Mexico, South Dakota, Vermont and West Virginia have passed laws similar to that of Iowa, which regulates obscenity only for children. In addition Hawaii (one of the model statutes cited by Miller) has repealed its obscenity law and Alaska regulates only the distribution, exhibition and sale of "objectionable" comic books.[96] Michigan is one of several states where the courts are in limbo, refusing to interpret obscenity statutes until the legislature acts to rewrite

the statutes and bring them in line with the Miller decision. This problem and the outlawing of local obscenity ordinances by the Michigan Supreme Court has effectively left Michigan without any obscenity regulation.[97] As it currently stands eight states have opted not to regulate the availability of sexually explicit materials to consenting adults, seventeen have adopted state-wide obscenity standards which "lessen the inconsistency and confusion inevitable in the application of literally thousands of potentially divergent local standards; nine have pre-empted local power to legislate controls on obscenity to some degree."[98]

Following the Supreme Court's dictum in U.S. v. 12 200 Ft.-Reels of Film[99] federal obscenity statutes have been judicially construed to satisfy the specificity requirement through incorporation of the Miller examples. For most purposes this was accomplished through the Hamling[100] case.

Regardless of how a given state interprets its specificity requirement, it may still run into problems trying to interpret the specific examples set down by Miller. The Court indicated that the Miller examples not only define the proper scope for specification, but also provide an acceptable level of linguistic clarity. Critics have argued, however, that the ambiguity of phrases like

"ultimate sexual acts" and "lewd exhibition of the genitals" leaves the Miller examples too vague to provide sufficient guidance.[101]

In the case of Jenkins v. Georgia, the movie Carnal Knowledge was found patently offensive by the Georgia Supreme Court under guidelines that were admittedly quite restrictive. The United States Supreme Court viewed it and on a unanimous decision determined that it was not obscene. According to Justice Rehnquist: "the occasional scenes of nudity and sexual conduct in the film did not fall within either of the two examples given in Miller and could not be regarded as sufficiently analagoug to justify similar treatment."[102] Reading the full text of the decision one gets the feeling that Rehnquist bases his remarks on the fact that the camera does not hold an extended close-up on the "ultimate acts" at any one time. The results of this case bear striking resemblance to the Redrup era and Justice Brennan observes as much: "this case illustrates the uncertainty of the Miller test whereby one could not say with certainty that material was obscene until five members of the Supreme Court, applying inevitably obscure standards, pronounced it so."[103]

If the Miller examples served only as a limitation of the scope of trier of fact discretion, their apparent ambiguity could perhaps be excused as the necessary result of a compromise of the conflicting interests in restricting

discretion and in allowing obscenity laws to be enforced against conduct which triers of fact might find offensively prurient. But because specification of potentially obscene conduct is also meant to provide guidance for persons engaged in the distribution of sexually explicit communications, as well as officials regulating that distribution, any ambiguity in the benchmark Miller examples remains a matter of concern. When first amendment interests are affected, statutory specificity is generally mandated to prevent vague statutes from chilling conduct not intended to be proscribed. More will be said about that below.

It should be noted at this point that a lawmaker's specification does not define obscenity. Potentially offensive communications may or may not be obscene, depending upon whether they actually offend community standards and whether they lack serious value. Offensiveness is meaningless if value can be shown. We move then to the third of the Miller tests.

V

Serious Value as Measured by L.A.P.S.

Chief Justice Burger makes it clear that while the first two tests in Miller are based on a community standard, the third--a measure of serious value--is not.[104] Miller's rule that a communication cannot be found obscene unless "the work taken as a whole, lacks serious literary, artistic, political or scientific value,"[105] is another device which helps narrow the discretion granted triers of facts referred to above. Miller implies that serious value is a legal conclusion derived from the first amendment, and therefore a standard that can control the trier of fact.

The substance of the standard is not totally clear. Some commentators have suggested that the serious value test literally puts the burden on distributors to prove the value of their work.[106] This criticism seems to be mistaken. The Miller serious value requirement does not lessen prosecutors' responsibility to prove obscenity beyond a reasonable doubt but instead redefines what constitutes obscenity for purposes of criminal prosecution. Certainly the rule that a trier of fact need consider no evidence except the material at issue may shift to

defendants the burden of presenting all evidence other than the material itself, but a shift in the burden of presentation short of a shift in the burden of persuasion does not violate due process.[107]

The courts have utilized several different methods of determining what is not obscene by virtue of serious value. Initially the courts have evaluated the audience of the work in question. The court in J. R. Distributing Inc. noted: "It is unlikely for example that despite its distributors' courtroom claims, a sexually-oriented book would be judged by its actual audience as a scientific work if the book were made available for sale only in so-called 'adult' bookstores and were advertised exclusively in 'sexploitation' magazines."[108] It should be noted that here audience identification is a test of nonobscenity as opposed to the pre-Miller days when it was used to judge obscenity.

Clearly if an arguably obscene work is advertised only in professional scientific journals and sold through academic bookstores, it is a plausible conclusion that the audience it reaches would judge the work in scientific terms.[109] This conclusion is further supported by the fact that it would be contrary at least to a distributor's financial interest to present an obscene work only to persons presumably not in the market for obscenity.

On a different level a work may be viewed as making a sexual claim for its audience's attention--and thus fall outside the scope of the first amendment--where potentially obscene elements are not rationally connected with parts of the communication said to establish the seriousness of the work. As the Supreme Court noted in Kois v. Wisconsin: "a quotation from Voltaire on the flyleaf of a book will not constitutionally redeem an otherwise obscene publication."[110] The theory of this rational connection test rests on the principle of severability. In the J. R. Distributing case the court held that there was no rational connection between a text discussing bestiality and graphic pictures of women engaging in other sexual acts.[111] The theory is that if the apparently obscene and serious elements of a work are unconnected, it is likely that first amendment interests would be only marginally affected by suppression; if the distributor were in fact attempting to reach the serious audience, and if distribution of the work in its present form were blocked, the distributor would likely market only the serious element.

The indirect evidence established by the claim a work makes for its audience may provide a sufficient basis for judging the validity of a work's claim to a privileged status. However if such an inquiry is inconclusive its seriousness must be established by more direct sampling of the work's claimed audience. A practical illustration

of the approach was provided in United Artists v. Gladwell[112] a decision declaring the film Last Tango in Paris to be a serious artistic effort. The Gladwell court based its conclusion on an analysis of the expert testimony introduced by both parties. The experts agreed that the picture did have a serious artistic purpose,[113] but differed as to whether the film achieved that purpose. For the court, the experts' disagreement concerning the film's success as art was irrelevant; it was their agreement--that the film should be judged as art--that was decisive. The important point here is that expert testimony, although not required under Miller, may thus play an important part in the serious value inquiry. Responsibility for introducing such testimony rests with the defendant.

Even where evidence and expert testimony are employed the trier of fact is bound to judge the work taken as a whole. In U.S. v. Misc. Pornography Magazines[114] the defendant relied on the L.A.P.S. test as his defense and brought in a psychiatrist to testify that the items were similar to those used in scientific research and a professor of photography who said that they were of artistic value. The trier of fact, who in this case was the judge, struck down both ideas:

1) He claimed that the views of these experts did not take into account their normal audience
2) it was suggested that the scientific value did not consider the work as a whole

3) the artist's view was that the work was stimulating, but that was a personal view and not one that applied representative standards of the artistic community.
4) While these items could conceivably be used for science or art, they were certainly not produced for that purpose.[115]

Some had suggested in the early days following Miller that the L.A.P.S. test was a large loophole in the new standards that would prove as troublesome as "no socially redeeming value." In actual practice the L.A.P.S. test has caused very few problems in interpretation and has been applied quite strictly.

VI

Miller in Application: Problems with Intra-Jurisdictional and Cross-Jurisdictional Variations in Standards

Having viewed the problems associated with the interpretation of each individual test, we turn now to ponder the problems of the national distributor in determining whether or not his communication falls within the boundaries of protected speech. For such distributors of sexually oriented materials, Miller's toleration of intra-jurisdictional and cross-jurisdictional variation in obscenity standards threatens to inhibit marketing and is thus the most important feature of the Miller system.

The possibility of intra-jurisdictional variation results from the discretion granted fact-finders to determine standards of obscenity in each case. This possibility is by no means abstract, given the research finding that persons within a particular community likely differ in their choice of standards for judging erotic material.[116] The court in U.S. v. "Various Articles" notes two instances where a community which had earlier approved a work found it obscene in a later hearing.[117] Clearly a distributor cannot feel secure within a locality even if he has been initially vindicated in his judgment.

The possibilities of cross-jurisdictional variation are readily apparent. The Miller Court as much as mandated this when they indicated that it was unfair for Maine or Mississippi to have to accept the standard of Nevada or New York.[118] Faced with the prospect of cross-jurisdictional variation in standards of offensive prurience, national distributors can choose variations of either of two marketing strategies to minimize the risk of obscenity prosecution. First, distributors might choose material for presentation, then adjust their patterns of presentation to fit the requirements of individual jurisdictions, thus making sexually oriented material available only in those jurisdictions where the material would not be found offensively prurient. Second, distributors may take a lowest common denominator approach, treating the pattern of distribution as fixed, and as a result choosing for general distribution only material acceptable under the standards of the least tolerant jurisdiction.

If this strategy of distribution were to become the norm, the Supreme Court's expectations as to Miller's effect would be frustrated since, taken to the extreme, least common denominator distributions create a uniform national standard--the standard defined by attitudes of the least tolerant jurisdiction. Several commentators have suggested that this is precisely the form of distribution that we are moving toward.[119]

The prospect of federal prosecution provides particular incentive to use lowest common denominator marketing strategies. The risk of federal prosecution is not hypothetical. State and local obscenity control efforts may be substantially frustrated by the inability to obtain evidence of sufficient scienter[120] against out-of-state owners of establishments dealing in obscenity. Federal prosecution of national distributors has thus become a necessary complement to state and local regulation. According to federal statute, prosecutions for violations of federal obscenity statutes may be brought in federal courts located in places where allegedly obscene material was produced or distributed, as well as such districts through which such material passed in transit.[121] Given cross-jurisdictional variation in standards of obscenity, federal prosecutors are thus presented with an opportunity to forum shop--to initiate criminal proceedings in the jurisdiction expected to be least tolerant of allegedly obscene material.[122]

Because cross-jurisdictional variation and the possibility of intra-jurisdictional variation combine to render standards of offensive prurience indeterminate, obscenity laws under Miller may deter publication of more sexually oriented materials than they actually proscribe.[123] Such an overbroad deterrent effect might be of less concern if the communicators inhibited by Miller generally fit the stereotype of pornographers, individuals distributing

material primarily of prurient interest who deliberately attempt to operate right at the boundary of first amendment protection. In fact, there is evidence to indicate that it has discouraged national distributors from presenting works that, although of apparent serious value, depict or describe conduct labelled potentially offensive by the Miller examples.[124] Miller's chilling effect is thought to be most pronounced in its impact upon national distributors' decisions concerning presentation of works by communicators without established reputations.[125]

The costs of involvement in criminal processes may be particularly high for distributors of serious works. Pornographers such as Larry Flynt and Al Goldstein tend to regard criminal prosecution, despite its risks, as a form of advertising. Deep Throat, for example, more than doubled weekly receipts from ticket sales through publicity during the course of a criminal prosecution of its New York City exhibitors.[126] National distributors of serious works, on the other hand, and especially their local agents, who deal with an audience on a recurring basis, could conclude that criminal prosecution on obscenity charges would undermine their credibility with their intended audiences. Such a possibility of damage to reputation, as well as a natural reluctance to undergo criminal prosecution, may explain why local exhibitors threatened with criminal prosecution refused to show the film Last Tango in Paris, forcing

United Artists to seek federal declaratory judgments, in three separate cases, that the film was not obscene.[127]

In the early days of Miller some judges believed that certain materials could be recognized as obscene independent of the standards of any particular community. In the case of Redlich v. Capri Cinema, Inc.[128] the court held a given movie to be "obscene by the standards of Sodom and Gomorrah." However there have been no such "universal obscenity judgments" since 1973 and more important there have been no judgments which ruled an item universally not obscene whatsoever.

One commentator posited the use of class-action suits seeking declaratory judgments for just such a purpose.[129] The idea here is to get a ruling on seemingly serious value works in advance of distribution in order to mitigate the chilling effect. Under Younger v. Harris,[130] however, federal injunctions of pending state prosecutions are ordinarily barred. In addition the policies of Younger require federal courts to tolerate state prosecutions initiated in contravention of federal declarations.[131] To date the concept of declaratory relief appears to have gained little acceptance.

A final paradox of obscenity regulation in general and Miller in particular is the idea of prurient interest narrowing the scope of regulation. In the words of Justice Stevens:

> If First Amendment protection is properly denied to materials that are patently offensive to the average citizen, I question whether the element of erotic appeal is of critical importance. The average person may find some portrayals of violence, disease or of intimate bodily functions (such as the birth of a child) equally offensive.[132]

Clearly Larry Flynt has carried the concept of obscenity to new all-time lows, but one wonders in cases of such perversion if there is in fact any prurient appeal in these sorts of depictions. If not, is this to be protected speech? It is noteworthy that one of the examples of an unprotected representation identified by the Miller Court (excretory functions) surely would have no erotic appeal to the average person.

So serious works of questionable obscenity struggle while much of what Miller sought to attack is anything but waning. A frustrated federal appeals judge recently remarked: "What is unfortunate is not that these matters have to come before the court, but that the hard core pornography industry is apparently flourishing despite the efforts of national, state and local communities to curb it."[133]

A commentator in the Michigan State Bar Journal observed: "Why should Michigan follow the course charted in Miller when history reveals that like courses have not only been destructive of legitimate, sexually oriented expression but have, at the same time, failed to lead to successful regulation of obscenity?"[134]

This paper by suggesting the pitfalls observed in four years of Miller regulation is more pointedly a criticism of obscenity standards in general. In twenty years of attempts by the Court to screen out that filthy commodity considered unworthy of the protections granted the general category of speech by our forefathers, there is as yet no valid benchmark for which items belong outside of the market-place of ideas. In fact, efforts to screen them out appear to do more harm than good.

It is unlikely that the current Miller majority will alter its views in the near future. It is also unlikely that when they do, they will veer away from the balancing of the past twenty years. However a pragmatic view of the current situation and of the findings of the Commission on Obscenity would lend credence to Justice Brennan's view that with the exception of children, our best course is to include all obscenity within the domain of protected speech and free our courts for more pressing criminal matters.

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Abstract

OBSCENITY LAW SINCE MILLER: ANOTHER TROUBLESOME BALANCING FORMULA

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This paper analyzes the major body of case law, legislation and commentary arising from the Supreme Court's landmark pronouncement on obscenity, Miller versus California. That 1973 decision set forth three general criteria for the discrimination of obscenity from those works protected by the First Amendment: the idea of a community standard, the idea of legislative specifications of what is patently offensive and a measure of literary, artistic, political or social value. For each of these three areas the major problems and controversies of the past five years are discussed with an analysis of their future direction.

A final chapter combines the three areas to provide an overview of the problems of Miller in application. It is suggested that the nature of local standards renders them ineffective as a means of regulation in a First Amendment related area.

In essence, the shift to local standards in obscenity prosecution offers little change from the earlier national standards, save greater confusion. On the one hand, virtually every procedural question that was supposedly defined by Miller has required clarification by a higher court. Then too, a national distributor facing the intricacies of inter-jurisdictional variances will scale material of questionable prurience to a least common denominator level. In either case one is left with a defacto national standard.

The conclusion is that attempts to regulate obscenity are perhaps less effective in controlling actual smut than they are in frustrating the serious work. The Miller decision has exacerbated this problem by increasing the confusion of the obscenity muddle.